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**SENATE BILL**

**No. 186**

**Introduced by Senator Murray**

(Principal coauthor: Assembly Member Correa)

(Coauthors: Assembly Members Bermudez, Maldonado, and  
Simitian)

February 12, 2003

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An act to *amend Section 17538.45 of, to add Article 1.8* (commencing with Section 17529) to Chapter 1 of Part 3 of Division 7 of, and to repeal ~~Sections Section 17538.4 and 17538.45~~ of, the Business and Professions Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

SB 186, as amended, Murray. Privacy: unsolicited commercial e-mail advertising.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material, as specified, unless that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail any further unsolicited documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on these unsolicited e-mailed documents, and prohibits the e-mailing of these unsolicited advertising documents to a person who has requested not to receive them. Existing law requires certain unsolicited e-mail advertisements to contain a heading of “ADV:” or “ADV:ADLT.” ~~Existing law prohibits the registered user of an e-mail service provider or any individual, corporation, or other entity from using or causing to be used the provider’s equipment located in this state in violation of the provider’s policies with regard to unsolicited e-mail advertisements, as specified. Existing law authorizes an e-mail service provider whose policy is violated to bring a civil action to recover specified damages.~~ A violation of the provisions governing advertising is a misdemeanor.

This bill would delete these provisions. The bill would instead prohibit a person or entity located in California from initiating, ~~sending~~, or advertising in, unsolicited commercial e-mail advertisements. The bill would prohibit a person or entity not located in California from initiating, ~~sending~~, or advertising in, unsolicited commercial e-mail advertisements sent to a California e-mail address. The bill would also prohibit a person or entity from collecting e-mail addresses or registering multiple e-mail addresses for the purpose of initiating or ~~sending~~ *advertising in* an unsolicited commercial e-mail advertisement from California or to a California e-mail address. The bill would prohibit a person or entity from ~~sending~~ *using* a commercial e-mail advertisement containing certain falsified, misrepresented, obscured, or misleading information.

This bill would authorize the recipient of a commercial e-mail advertisement transmitted in violation of these prohibitions, the electronic mail service provider, or the Attorney General to bring an action to recover actual damages and would authorize these parties to recover liquidated damages of \$1,000 per transmitted message up to \$1,000,000 per incident, as defined, subject to reduction by a court for specified reasons. The bill would ~~also~~ provide for an award of reasonable attorney’s fees and costs to a prevailing plaintiff. The bill



would provide that a cause of action in existence prior to its enactment would be governed by the law in effect at the time it arose. The bill would enact other related provisions.

*Existing law prohibits the registered user of an e-mail service provider, or any individual, corporation, or other entity, from using or causing to be used the provider's equipment located in this state in violation of the provider's policies with regard to unsolicited e-mail advertisements. Existing law authorizes an e-mail service provider whose policy is violated to bring a civil action to recover specified damages.*

*This bill would prohibit an e-mail service provider from bringing an action under both this provision and other provisions being added by the bill for the same unsolicited e-mail advertisement.*

This bill would provide that if any part of these provisions or their applications is deemed invalid, the invalidity would not affect other provisions.

Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. Article 1.8 (commencing with Section 17529)  
2 is added to Chapter 1 of Part 3 of Division 7 of the Business and  
3 Professions Code, to read:

4  
5 Article 1.8. Restrictions On Unsolicited Commercial E-mail  
6 Advertisers  
7

8 17529. The Legislature hereby finds and declares all of the  
9 following:

10 (a) Roughly 40 percent of all e-mail traffic in the United States  
11 is comprised of unsolicited commercial e-mail advertisements

1 (hereafter spam) and industry experts predict that by the end of  
2 2003 half of all e-mail traffic will be comprised of spam.

3 (b) The increase in spam is not only an annoyance but is also  
4 an increasing drain on corporate budgets and possibly a threat to  
5 the continued usefulness of the most successful tool of the  
6 computer age.

7 (c) Complaints from irate business and home-computer users  
8 regarding spam have skyrocketed, and polls have reported that 74  
9 percent of respondents favor making mass spamming illegal and  
10 only 12 percent are opposed, and that 80 percent of respondents  
11 consider spam very annoying.

12 (d) According to Ferris Research Inc., a San Francisco  
13 consulting group, spam will cost United States organizations more  
14 than ten billion dollars (\$10,000,000,000) this year, including lost  
15 productivity and the additional equipment, software, and  
16 manpower needed to combat the problem. California is 12 percent  
17 of the United States population with an emphasis on technology  
18 business, and it is therefore estimated that spam costs California  
19 organizations well over 1.2 billion dollars (\$1,200,000,000).

20 (e) Like junk faxes, spam imposes a cost on users, using up  
21 valuable storage space in e-mail inboxes, as well as costly  
22 computer band width, and on networks and the computer servers  
23 that power them, and discourages people from using e-mail.

24 (f) Spam filters have not proven effective.

25 (g) Like traditional paper “junk” mail, spam can be annoying  
26 and waste time, but it also causes many additional problems  
27 because it is easy and inexpensive to create, but difficult and costly  
28 to eliminate.

29 (h) The “cost shifting” from ~~senders of deceptive spam~~  
30 *deceptive spammers* to Internet business and e-mail users has been  
31 likened to sending junk mail with postage due or making  
32 telemarketing calls to someone’s pay-per-minute cellular phone.

33 (i) Many spammers have become so adept at masking their  
34 tracks that they are rarely found, and are so technologically  
35 sophisticated that they can adjust their systems to counter special  
36 filters and other barriers against spam and can even electronically  
37 commandeer unprotected computers, turning them into  
38 spam-launching weapons of mass production.

39 (j) There is a need to regulate the advertisers who use spam, as  
40 well as the actual ~~senders of the spam, because the actual senders~~

1 *spammers, because the actual spammers* can be difficult to track  
2 down due to some return addresses that show up on the display as  
3 “unknown” and many others being obvious fakes and they are  
4 often located offshore.

5 (k) The true beneficiaries of spam are the advertisers who  
6 benefit from the marketing derived from the advertisements.

7 (l) In addition, spam is responsible for virus proliferation that  
8 can cause tremendous damage both to individual computers and to  
9 business systems.

10 (m) Because of the above problems, it is necessary that spam  
11 be prohibited and that commercial advertising e-mails be  
12 regulated as set forth in this article.

13 17529.1. For the purpose of this article, the following  
14 definitions apply:

15 (a) “Advertiser” means a person or entity that advertises  
16 through the use of ~~unsolicited~~ commercial e-mail advertisements.

17 (b) “California electronic mail address” or “California e-mail  
18 address” means any of the following:

19 (1) An e-mail address furnished by an electronic mail service  
20 provider that sends bills for furnishing and maintaining that e-mail  
21 address to a mailing address in this state.

22 (2) An e-mail address ordinarily accessed from a computer  
23 located in this state.

24 (3) An e-mail address furnished to a resident of this state.

25 (c) “Commercial e-mail advertisement” means any electronic  
26 mail message initiated for the purpose of advertising or promoting  
27 the lease, sale, rental, gift offer, or other disposition of any  
28 property, goods, services, or extension of credit.

29 (d) “Direct consent” means that the recipient has expressly  
30 consented to receive e-mail advertisements from the advertiser,  
31 either in response to a clear and conspicuous request for the  
32 consent or at the recipient’s own initiative.

33 (e) “Domain name” means any alphanumeric designation that  
34 is registered with or assigned by any domain name registrar as part  
35 of an electronic address on the Internet.

36 (f) “Electronic mail” or “e-mail” means an electronic  
37 message that is *sent to an e-mail address and* transmitted between  
38 two or more telecommunications devices, computers, or  
39 electronic devices capable of receiving electronic messages,  
40 whether or not the message is converted to hard copy format after

1 receipt or is viewed upon transmission or stored for later retrieval.  
2 “Electronic mail” or “e-mail” includes electronic messages that  
3 are transmitted through a local, regional, or global computer  
4 network.

5 (g) “Electronic mail address” or “e-mail address” means a  
6 destination, commonly expressed as a string of characters, to  
7 which electronic mail can be sent or delivered. An “electronic mail  
8 address” or “e-mail address” consists of a user name or mailbox  
9 and a reference to an Internet domain.

10 (h) “Electronic mail service provider” means any person,  
11 including an Internet service provider, that is an intermediary in  
12 sending or receiving electronic mail or that provides to end users  
13 of the electronic mail service the ability to send or receive  
14 electronic mail.

15 (i) ~~“Initiate the transmission of a commercial e-mail~~  
16 ~~advertisement”~~ “Initiate” means to transmit or cause to be  
17 transmitted a commercial e-mail advertisement or assist in the  
18 transmission of a commercial e-mail advertisement by providing  
19 electronic mail addresses where the advertisement may be sent, but  
20 does not include the routine transmission of the advertisement  
21 through the network or system of a telecommunications utility or  
22 an electronic mail service provider through its network or system.

23 (j) “Incident” means a single transmission or delivery ~~by an~~  
24 ~~advertiser or sender~~ to a single recipient or to multiple recipients  
25 of unsolicited commercial e-mail advertisement containing  
26 substantially similar content.

27 (k) “Internet” has the meaning set forth in paragraph (6) of  
28 subdivision (e) of Section 17538.

29 (l) “Preexisting or current business relationship,” as used in  
30 connection with the sending of a commercial e-mail  
31 advertisement, means that the recipient has made an inquiry and  
32 has provided his or her e-mail address, or has made an application,  
33 purchase, or transaction, with or without consideration, regarding  
34 products or services offered by the ~~sender~~ advertiser.

35 Commercial e-mail advertisements sent pursuant to the  
36 exemption provided for a preexisting or current business  
37 relationship shall provide the recipient of the commercial e-mail  
38 advertisement with the ability to “opt-out” from receiving further  
39 commercial e-mail advertisements by calling a toll-free telephone  
40 number or by sending an “unsubscribe” e-mail to the ~~sender of~~

*advertiser offering the products or services in the commercial e-mail advertisement. This opt-out provision does not apply to recipients who are receiving free e-mail service with regard to commercial e-mail advertisements sent by the provider of the e-mail service.*

(m) “Recipient” means the addressee of an unsolicited commercial e-mail advertisement. If an addressee of an unsolicited commercial e-mail advertisement has one or more ~~e-mail~~ *e-mail* addresses to which an unsolicited commercial e-mail advertisement is sent, the addressee shall be deemed to be a separate recipient for each e-mail address to which the e-mail advertisement is sent.

(n) “Routine transmission” means the transmission, routing, relaying, handling, or storing of an electronic mail message through an automatic technical process. “Routine transmission” shall not include the sending, or the knowing participation in the sending, of unsolicited commercial e-mail advertisements.

~~(o) “Sender” means a person or entity who initiates the transmission of an unsolicited commercial e-mail advertisement.~~

~~(p)~~ “Unsolicited commercial e-mail advertisement” means a commercial e-mail advertisement sent to a recipient who meets both of the following criteria:

(1) The recipient has not provided direct consent to receive advertisements from the advertiser.

(2) The recipient does not have a preexisting or current business relationship, as defined in subdivision (l), with the advertiser promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

17529.2. Notwithstanding any other provision of law, a person or entity may not do ~~either~~ *any* of the following:

(a) Initiate or ~~send~~ *advertise in* an unsolicited commercial e-mail advertisement from California or advertise in an unsolicited commercial e-mail advertisement sent from California.

(b) Initiate or ~~send~~ *advertise in* an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

(c) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall



1 not affect any other provision or application that can be given  
2 effect without the invalid provision or application.

3 17529.3. Nothing in this article shall be construed to limit or  
4 restrict the adoption, implementation, or enforcement by a  
5 provider of Internet access service of a policy of declining to  
6 transmit, receive, route, relay, handle, or store certain types of  
7 electronic mail messages.

8 17529.4. (a) It is unlawful for any person or entity to collect  
9 electronic mail addresses posted on the Internet if the purpose of  
10 the collection is for the electronic mail addresses to be used ~~by a~~  
11 ~~sender~~ to do either of the following:

12 (1) Initiate or ~~send~~ *advertise in* an unsolicited commercial  
13 e-mail advertisement from California, or advertise in an  
14 unsolicited commercial e-mail advertisement sent from  
15 California.

16 (2) Initiate or ~~send~~ *advertise in* an unsolicited commercial  
17 e-mail advertisement to a California electronic mail address, or  
18 advertise in an unsolicited commercial e-mail advertisement sent  
19 to California electronic mail address.

20 (b) It is unlawful for any person or entity to use an electronic  
21 mail address obtained by using automated means based on a  
22 combination of names, letters, or numbers to do either of the  
23 following:

24 (1) Initiate or ~~send~~ *advertise in* an unsolicited commercial  
25 e-mail advertisement from California, or advertise in an  
26 unsolicited commercial e-mail advertisement sent from  
27 California.

28 (2) Initiate or ~~send~~ *advertise in* an unsolicited commercial  
29 e-mail advertisement to a California electronic mail address, or  
30 advertise in an unsolicited commercial e-mail advertisement sent  
31 to a California electronic mail address.

32 (c) It is unlawful for any person to use scripts or other  
33 automated means to register for multiple electronic mail accounts  
34 from which to do, or to enable another person to do, either of the  
35 following:

36 (1) Initiate or ~~send~~ *advertise in* an unsolicited commercial  
37 e-mail advertisement from California, or advertise in an  
38 unsolicited commercial e-mail advertisement sent from  
39 California.





(2) Initiate or ~~send~~ *advertise in* an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

17529.5. It is unlawful for any person or entity to advertise using a commercial e-mail advertisement either sent from California or sent to a California electronic mail address under any of the following circumstances:

(a) The commercial e-mail advertisement contains or is accompanied by a third party's domain name without the permission of the third party.

(b) The commercial e-mail advertisement contains or is accompanied by falsified, misrepresented, obscured, or forged header information. This paragraph does not apply to truthful information used by a third party who has been lawfully authorized by the advertiser to use that information.

(c) The commercial e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

17529.8. (a) (1) In addition to any other remedies provided by this article or by any other provisions of law, a recipient of an unsolicited commercial e-mail advertisement transmitted in violation of this article, an electronic mail service provider, or the Attorney General may bring an action against an entity that violates any provision of this article to recover either or both of the following:

(A) Actual damages.

(B) Liquidated damages of one thousand dollars (\$1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of Section 17529.2, up to one million dollars (\$1,000,000) per incident.

(2) The recipient, an electronic mail service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.

(3) However, there shall not be a cause of action against an electronic mail service provider that is only involved in the routine transmission of the unsolicited commercial e-mail advertisement over its computer network.

(b) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this article, the court shall reduce the liquidated damages recoverable under subdivision (a) to a maximum of one hundred dollars (\$100) for each unsolicited commercial e-mail advertisement, or a maximum of one hundred thousand dollars (\$100,000) per incident.

17529.9. The provisions of this article are severable. If any provision of this article or its application is held invalid, that invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application.

SEC. 2. Section 17538.4 of the Business and Professions Code is repealed.

~~SEC. 3. Section 17538.45 of the Business and Professions Code is repealed.~~

SEC. 3. Section 17538.45 of the Business and Professions Code is amended to read:

17538.45. (a) For purposes of this section, the following words have the following meanings:

(1) “Electronic mail advertisement” means any electronic mail message, the principal purpose of which is to promote, directly or indirectly, the sale or other distribution of goods or services to the recipient.

(2) “Unsolicited electronic mail advertisement” means any electronic mail advertisement that meets both of the following requirements:

(A) It is addressed to a recipient with whom the initiator does not have an existing business or personal relationship.

(B) It is not sent at the request of or with the express consent of the recipient.

(3) “Electronic mail service provider” means any business or organization qualified to do business in California that provides registered users the ability to send or receive electronic mail through equipment located in this state and that is an intermediary in sending or receiving electronic mail.

(4) “Initiation” of an unsolicited electronic mail advertisement refers to the action by the initial sender of the electronic mail advertisement. It does not refer to the actions of

1 any intervening electronic mail service provider that may handle  
2 or retransmit the electronic message.

3 (5) “Registered user” means any individual, corporation, or  
4 other entity that maintains an electronic mail address with an  
5 electronic mail service provider.

6 (b) No registered user of an electronic mail service provider  
7 shall use or cause to be used that electronic mail service provider’s  
8 equipment located in this state in violation of that electronic mail  
9 service provider’s policy prohibiting or restricting the use of its  
10 service or equipment for the initiation of unsolicited electronic  
11 mail advertisements.

12 (c) No individual, corporation, or other entity shall use or cause  
13 to be used, by initiating an unsolicited electronic mail  
14 advertisement, an electronic mail service provider’s equipment  
15 located in this state in violation of that electronic mail service  
16 provider’s policy prohibiting or restricting the use of its equipment  
17 to deliver unsolicited electronic mail advertisements to its  
18 registered users.

19 (d) An electronic mail service provider shall not be required to  
20 create a policy prohibiting or restricting the use of its equipment  
21 for the initiation or delivery of unsolicited electronic mail  
22 advertisements.

23 (e) Nothing in this section shall be construed to limit or restrict  
24 the rights of an electronic mail service provider under Section  
25 230(c)(1) of Title 47 of the United States Code, or any decision of  
26 an electronic mail service provider to permit or to restrict access  
27 to or use of its system, or any exercise of its editorial function.

28 (f) (1) In addition to any other action available under law, any  
29 electronic mail service provider whose policy on unsolicited  
30 electronic mail advertisements is violated as provided in this  
31 section may bring a civil action to recover the actual monetary loss  
32 suffered by that provider by reason of that violation, or liquidated  
33 damages of fifty dollars (\$50) for each electronic mail message  
34 initiated or delivered in violation of this section, up to a maximum  
35 of twenty-five thousand dollars (\$25,000) per day, whichever  
36 amount is greater.

37 (2) In any action brought pursuant to paragraph (1), the court  
38 may award reasonable attorney’s fees to a prevailing party.

39 (3) (A) In any action brought pursuant to paragraph (1), the  
40 electronic mail service provider shall be required to establish as an

1 element of its cause of action that prior to the alleged violation, the  
2 defendant had actual notice of both of the following:

3 (i) The electronic mail service provider's policy on unsolicited  
4 electronic mail advertising.

5 (ii) The fact that the defendant's unsolicited electronic mail  
6 advertisements would use or cause to be used the electronic mail  
7 service provider's equipment located in this state.

8 (B) In this regard, the Legislature finds that with rapid  
9 advances in Internet technology, and electronic mail technology in  
10 particular, Internet service providers are already experimenting  
11 with embedding policy statements directly into the software  
12 running on the computers used to provide electronic mail services  
13 in a manner that displays the policy statements every time an  
14 electronic mail delivery is requested. While the state of the  
15 technology does not support such a finding at present, the  
16 Legislature believes that, in a given case at some future date, a  
17 showing that notice was supplied via electronic means between the  
18 sending and receiving computers could be held to constitute actual  
19 notice to the sender for purposes of this paragraph.

20 ~~(4) A violation of this section shall not be subject to Section~~  
21 ~~17534.~~

22 (4) (A) *An electronic mail service provider who has brought an*  
23 *action against a party for a violation subject to Section 17529.8*  
24 *shall not bring an action against that party under this section for*  
25 *the same unsolicited commercial electronic mail advertisement.*

26 (B) *An electronic mail service provider who has brought an*  
27 *action against a party for a violation of this section shall not bring*  
28 *an action against that party under Section 17529.8 for the same*  
29 *unsolicited commercial electronic mail advertisement.*

30 SEC. 4. A cause of action that is in existence before the  
31 effective date of this act shall not be affected by this act, but shall  
32 instead be governed by the law that was in effect at the time the  
33 cause of action arose.

34 SEC. 5. No reimbursement is required by this act pursuant to  
35 Section 6 of Article XIII B of the California Constitution because  
36 the only costs that may be incurred by a local agency or school  
37 district will be incurred because this act creates a new crime or  
38 infraction, eliminates a crime or infraction, or changes the penalty  
39 for a crime or infraction, within the meaning of Section 17556 of  
40 the Government Code, or changes the definition of a crime within

1 the meaning of Section 6 of Article XIII B of the California  
2 Constitution.

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